

**THE LABOR COMMISSION  
WORKERS' COMPENSATION ADVISORY COUNCIL**

**Wednesday, September 10, 2008 - 12:00 P.M.  
Room 319, Heber Wells Building  
160 East 300 South  
Salt Lake City, Utah**

**The following Advisory Council members were in attendance:**

Ralph Astorga, President USWA Local 392  
Dawn Atkin, Esq.  
Todd Bingham for Thomas Bingham, President, Utah Manufacturers Association  
David Bird, Esq.  
Brandt Goble, Painters and Tapers Local 77  
Brian Kelm, Esq.  
Edward Holmes, M.D., RMCOEH  
Susan Kelly, Liberty Mutual  
James V. Olsen, President, Utah Food Industry Association  
Jeff Rowley, Risk Manager, Salt Lake County  
Richard J. Thorn, President/CEO, Associated General Contractors - Utah Chapter  
Brad Tibbitts, Utah State Insurance Department  
Dennis Lloyd for Ray Pickup, Workers Compensation Fund

**The following Advisory Council members were excused:**

Reo Castleton, SL County Fire Department

**Others Present:**

Sherrie Hayashi - Commissioner  
Alan Hennebold - Deputy Labor Commissioner  
Larry Bunkall, Industrial Accidents Division Director, Labor Commission  
Robyn Barkdull - Public Information Officer, Labor Commission  
Richard LaJeunesse - Administrative Law Judge, Labor Commission  
Debbie Hann - Administrative Law Judge, Labor Commission  
Colleen Traynor - Administrative Law Judge, Labor Commission  
Karla Rush - Adjudication Division, Labor Commission  
Richard Burke - Attorney  
Ron Dressler - Policy Director, Labor Commission

**WELCOME**

**1. Welcome - Commissioner Hayashi**

**Commissioner Hayashi** brought the meeting to order at 12:05 p.m.

**2. Approval of Minutes - Commissioner Hayashi**

**Dawn Atkin** moved to approve the minutes of the June 11, 2008 meeting. **David Bird** seconded the motion which passed unanimously.

**3. Set special meeting for WCA regarding the Employers' Reinsurance Fund (ERF) and Uninsured Employers' Fund (UEF) rate adjustments – Commissioner Hayashi.**

**Commissioner Hayashi** explained that the 2008 Actuarial Reports for the rate adjustments of the ERF and the UEF prepared by Milliman, Inc. will be available after October 2<sup>nd</sup> for Council to review and comment. The Commission's recommendation must be given to the Tax Commission prior to October 15, 2008. She asked that the WCA Council set a meeting to discuss the report.

Attorney's fees will also be on that agenda as well as any other items from today's meeting agenda that may not be addressed because of time constraints.

It was agreed that the meeting for the Workers' Compensation Advisory Council would be held on Tuesday, October 14, 11:30 a.m. for lunch, followed by an Open Meeting at 12:00 p.m.

**4. The next regularly scheduled meeting of the WCA Council – Commissioner Hayashi**

**Commissioner Hayashi** pointed out that the next regularly scheduled meeting will be held on a Thursday, November 20<sup>th</sup>. She called attention to that date as the Council generally meets on Wednesdays.

**5. Legislative Liaisons to serve on the WCA Council – Commissioner Hayashi**

**Commissioner Hayashi** said after consulting with each of the members of the Council and asking for their opinions through email, **Senator Karen Mayne and Representative Mike Morley** will be the legislative liaison for the WCA Council. They will be attending future meetings.

**6. Review, discuss and take action on proposed statutory changes:**

**a. Action on Sunset Review of Utah Injured Worker Reemployment Act and recommend legislative action.**

**Larry Bunkall** explained that the Utah Injured Worker Reemployment Act would sunset soon. He said the Act is 20 years old and needed to be updated with some amendments if it is decided it should be continued. He recommended that it not be allowed to sunset as it had been successful and was important to the Workers' Compensation system.

**Mr. Bunkall** went through the amendments which include definitions, reporting, and enforcement. Enforcement includes the imposing of a \$500 fine if an injured worker's employer, or the employer's workers' compensation insurance carrier, fails to comply with filing an initial report to the Industrial Accident's Division Director outlining the Reemployment Evaluation and Plan. That report must be filed within 30 days. **Mr. Bunkall** felt the reporting requirement helps keep the Labor Commission apprised and involved, but as currently there is no enforcement, a fine would remedy that fact.

**Dennis Lloyd** stated that having a penalty attached to the Act did not comply with the original spirit of the Act as it was written 20 years ago.

**Alan Hennebold** said the idea behind the penalty was to provide consequence if employers or insurance carriers failed to perform their obligations under the Act.

It was pointed out that line 353 should say "injured" worker and not "insured" worker.

**Susan Kelly** called the Council's attention to line 445. She asked that the notification required be "written notification" and specified that way in the proposed legislation. This means of authorization would avoid any confusion or oversight.

**Mr. Bunkall** said that the Legislative committee had asked the Commission to come to the September 15<sup>th</sup> meeting prepared to make a recommendation on what they would like to see done with the Utah Injured Worker Reemployment Act.

**MOTION: Ms. Atkin** moved that the Commission proceed with finalizing the language in the proposed legislation for the Utah Injured Worker Reemployment Act. She added this would include the penalty, but specify that the amounts collected from the penalty would go to the Uninsured Employers Fund.

Several council members voiced concern that the penalty amount should be explored for accuracy consideration be given to the capability to change the amount in the legislation at a later date.

**SUBSTITUTE MOTION: Mr. Bird** moved that the Commission proceed with finalizing the language in the proposed legislation for the Utah Injured Worker Reemployment Act. This would include the penalty with the change on lines 395 – 399 that the penalty be "a reasonable amount up to \$1,500" and specifying that the amounts collected from the penalty go to the Uninsured Employers Fund. **Brian Kelm** seconded the motion which passed unanimously.

**(b) Eliminate need to have medical panel reports sent by certified mail – cost savings – Richard LaJeunesse.**

**Mr. LaJeunesse** asked the Council to consider recommending the Commission eliminate the need to send medical panel reports by certified mail. He said it was unnecessary and at a considerable cost to the Commission.

**MOTION: Ms. Atkin** moved to recommend that the Commission draft legislation to eliminate the certified mail requirement when mailing out medical panel reports. **Jeff Rowley** seconded the motion which passed unanimously.

**(c) Discuss possible legislation to allow UEF to directly collect debts and penalties from non-compliant employers rather than using the Office of State Debt Collection (OSDC) to collect debts and penalties as is currently required by law.**

**Mr. Bunkall** told the Council that the Commission would like to have the capability of directly collecting penalties through a private attorney. These penalties are associated with employers found to be non-compliant in having workers' compensation insurance. He said currently the law requires the Commission to use the OSDC to collect the money. Past experience has shown the OSDC to be less effective in collecting penalties than a private contract attorney. As this money is directly used to fund the UEF, **Mr. Bunkall** said the Commission is very dependent on these funds and would like to have the option of collecting through the most efficient source.

**MOTION: Mr. Bird** moved to recommend that the Commission draft legislation for the Council's consideration to give flexibility to the Commission in the way penalties are collected. **Jim Olsen** seconded the motion which passed unanimously.

**Commissioner Hayashi** asked the Council to be vocal in their support of this proposal as it would be met with great opposition. She again expressed the importance of the money collected and the need to maximize the effort involved.

**7. Review new WC administrative rules and proposed changes to WC administrative rules.**

Newly created rule R602-4, Procedures for Termination of Temporary Total Disability Compensation Pursuant to Reemployment creates an expedited hearing process to implement H.B. 384 (“Morley Bill”) which went into effect on July 1, 2008. This rule was implemented through emergency rule making. R602-5, Procedures for Resolving Disputes Regarding “Cooperation” and “Diligent Pursuit”, is a new rule to implement hearing procedures for the permanent total disability expedited hearings that are currently contained in R612-1-10 (industrial accidents rule on permanent total disability).

R602-2-5, related to settlement agreements, is being moved with no change in the language to a new section, R602.6.

The Adjudication Division held a public meeting to take comment on the proposed Rule R602-4. The Commission received feedback, primarily based upon misperceptions about the WC system and the effect this would have on undocumented workers. Alan Hennebold prepared a memo which gave a short background on the proposal and summarized the public comments. It is included below:

**MEMORANDUM:** Summary of comments regarding proposed Rule 602-4  
“Termination of Temporary total Disability Benefits.”

**FROM:** Alan Hennebold, Deputy commissioner/General Counsel

**TO:** Members, Utah Workers’ Compensation Advisory Council

**DATE:** August 28, 2008

**Background.** As you know, the 2008 Utah Legislature enacted H.B. 1<sup>st</sup> Sub. H.B. 384, allowing employers or insurance carriers to request Commission permission to terminate or reduce temporary disability compensation for injured workers who engage in certain types of misconduct after being brought back to light-duty work. H.B. 384 became effective July 1, 2008. That same day, the Labor Commission promulgated Rule 602-4, setting forth procedural rules for implementing H.B. 384. The rule was enacted on a temporary emergency basis so that it would take effect on the same day as H.B. 384. Temporary rule 602-4 will automatically expire on November 1, 2008.

The Commission is now considering whether changes should be made to its emergency rule before that rule is reenacted as a permanent rule. The Commission has solicited comments from anyone interested in this matter and has received nearly 20 responses. They are summarized and separated into two categories below – those dealing with undocumented workers and those addressing other aspects of the rule’s operation. The rule will be discussed at the Advisory Council’s meeting on Wednesday, September 10, 2008.

**Comments regarding the rule’s perceived effect on undocumented workers.**

One comment urged approval of the rule to prevent undocumented workers from “draining workers’ compensation funds” and perpetrating identity theft.

All other comments on this point opposed the rule, for the following stated reasons:

- Unfair – employers exploit undocumented workers with low wages and difficult work.
- Employer misconduct – employers don’t bother to verify workers’ legal status when they hire them.
- “Criminal conduct” could extend to nothing more than working without documentation.
- No confidence in vague assurances that rule’s ambiguous provisions will not be misapplied.
- The rule should incorporate § 34A-2-413’s provision that prevent consideration of undocumented status in the adjudication of claims for permanent total disability benefits.
- The rule targets undocumented workers.

- Workers should not have burden of proving they are eligible to work.
- Workers who don't speak English should not have to pay for interpreter.
- Employers should suffer some consequence for false accusations.
- Employers should be held responsible for hiring undocumented workers in the first place.
- Improper purpose of the rule is to eliminate benefits to undocumented injured workers.
- Rule can be used as a discriminatory weapon to intimidate minorities.
- Shifts costs of injury away from the employer, where they belong, and to the worker and to taxpayers generally.
- If worker is injured while working, it shouldn't matter whether or not he or she was working legally.
- Proposed rule would have unintended consequences of perpetuating unsafe work conditions and creating an incentive for employers to hire illegal workers.
- Commission should maintain statistics on rule's effect on minorities.

**Other comments regarding the rule's operation.**

- Allegation of criminal conduct should not be enough to trigger hearing – what happened to “innocent until proven guilty”?
- Mediation should not be required.
- Mediation should not be required to finish before filing application – should only require that it be finished prior to hearing.
- Adverse presumption for failure to produce witnesses violates due process and should be removed from proposed rule.
- Adverse presumption would force long hearings.
- Question of effect of 4-day work week on filing deadlines.
- No provisions for attorney's fees for injured workers' attorneys.
- Proposed 2<sup>nd</sup> degree felony for adjusters and insurance company CEO's who fail to comply with the rule prior to terminating benefits.
- Sanctions for ALJ's failure to meet time limits for issuing decisions.
- If there are expedited hearings to terminate benefits, there ought to be expedited hearings to receive benefits.
- Rule's prohibition against formal discovery and motion practice, and the rule's time limits for issuing decisions should be applied to all workers' compensation cases.
- Documentation supporting termination should be attached to the application rather than submitted 15 days before hearing.
- More time should be allowed between filing an application and holding the hearing.
- Correction of errors through motion for review process is inadequate because of the time it takes.

The Council reviewed the comments and information.

**MOTION: Mr. Bird** moved the Council recommend to the Commission that the proposed rules should proceed through the rulemaking process. **Mr. Rowley** seconded the motion which passed unanimously.

**Commissioner Hayashi** reminded Council members the next WCA Council meeting would be held Tuesday, October 14<sup>th</sup> at 11:30 a.m. She adjourned the meeting at 1:40.